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# The Normative Jinx

Christoph Kletzer\*

**Abstract**—In this paper I present and defend the claim that law and morality cannot be considered to be valid simultaneously. This claim is the result of the combination of two theses, *normative monism*, on the one hand, and *legal/moral incompatibilism*, on the other. The first thesis maintains that we can only make sense of norms if we consider them to be part of one normative systems. The second thesis claims that law and morality cannot form part of one normative system. The result of the combination of both theses produces what I call the normative jinx: if we take law to be valid, then there is no moral point of view from which to assess the law; if we consider morality to be valid, there cannot possibly be valid law that could be the object of moral assessment.

**Keywords:** jurisprudence, Kelsen, positivism, legal monism, law and morality, normative monism

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Why is it so hard to theoretically square law and morality? Both seem to be cut from the same cloth, both employ the same conceptual inventory and both are directed at similar phenomena. Still, despite the fact that most readers will very likely feel confident that they have a sound understanding of the relevant relations, the variance in these understandings indicates that there still remains an itch that none of the countless permutations of the relation we have gone through has relieved us of. In this paper I am going to present a radical cure for this itch. I will present and defend the claim that law and morality do not and cannot stand in any relation to each other whatsoever, as they cannot both be considered to be valid at the same time. I will argue that the validity of the law excludes the validity of morality and vice versa.<sup>1</sup>

This seemingly strange position is what I call the normative jinx. It explains two things at the same time: what the true, paradoxical relation of law and morality is and why we find it so hard to get a grip on it.

The normative jinx is the consequence of the combination of two rather straight-forward theses: normative monism and legal/moral incompatibilism. The first is simply the denial of normative pluralism. It claims that normative pluralism cannot appropriately account for the phenomenon of normativity and that if law and morality are to be considered valid simultaneously they have to be considered being part of one normative system. The second is the claim that law and morality cannot be part of one single normative system. What follows is that law and morality cannot be considered to be valid simultaneously.

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<sup>1</sup> This claim is certainly inspired by the work of Hans Kelsen and the Vienna School of Legal Positivism. However, since Kelsen himself changed his view on this issue significantly throughout his intellectual life I will not try to pin the claims I am making on Kelsen. Rather, I present the claim as my own, and be it heavily inspired by the Vienna School of Legal Positivism. For Kelsen's version of a similar claim see Hans Kelsen, *General Theory of Law and State* (Harvard University Press 1949) 407-18 and *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus* (Heise 1928).

In this paper I will present and defend both theses. I think that neither is particularly controversial. It is their combination that produces the bedevilled effect.

Whilst variants of legal/moral incompatibilism may be familiar from debates of philosophical anarchism and hard positivism, normative monism, in the way I present it here, faces the challenge of either sounding terribly implausible, or, if made to sound less implausible, of appearing to be *trivial*.

A normative monist denies the possibility of normative pluralism. A normative pluralist is someone who thinks that it is possible that there exist two or more normative systems which are valid independently of each other. For the normative pluralist it must thus be possible that there exist two norms which despite being both valid still stand in no normative relation to each other. The normative monist denies this possibility. The structure of this debate is similar to the structure of the debate between the legal monist and the legal pluralist: whereas the legal pluralist (often a dualist) claims that it is conceivable that two norms, despite being legal norms, stand in no legal relation to each other, the legal monist denies this possibility.

The crux here is quite obviously what ‘standing in a normative relation’ means. I will try to answer this question. In order to do that I will first have a look at the legal monism/pluralism debate to highlight what ‘standing in a *legal* relation’ means.

## 1. Legal Monism

The legal pluralist argues that it is possible for two norms to be valid yet to stand in no legal relation to each other. A legal monist denies that this could ever be possible.<sup>2</sup> A legal monist argues that in every seemingly pluralistic set-up by necessity a legal norm can be found that connects the two seemingly unrelated norms and unifies them into one legal system.<sup>3</sup>

On first reflection, legal monism seems straightforwardly false. After all, many examples spring to ones mind that appear to plainly contradict legal monism. The criminal law of the Icelandic Althing, the WTO rules regulating technical barriers to trade, and the customary Korean rules regulating clan membership must surely be elements of different legal systems. Equally, to take Lars Vinx's seemingly decisive example, it would 'make no sense for a legal historian to argue that the legal system of the Roman Empire and of the Chinese Empire formed parts of one global legal system.'<sup>4</sup>

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<sup>2</sup> The present paper does not follow Hart's and Raz's view that a monist is someone who claims that in order to have a unified legal system it is sufficient that one legal system 'purports to validate' another. I know of no monist who would claim that. Certainly Kelsen, who is Hart's main target, would never have claimed such a thing. Quite clearly, Hart here has set himself up a straw-man. See HLA Hart, 'Kelsen's Doctrine of the Unity of Law' in HLA Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press 1983) 309; Joseph Raz, *The Concept of Legal System. An Introduction to the Theory of Legal System* (Oxford University Press 1970) 95-109. For a critical discussion setting the debate straight see Lars Vinx, 'Austin, Kelsen, and the Model of Sovereignty: Notes on the History of Modern Legal Positivism' in Michael Freeman and Patricia Mindus (eds), *The Legacy of John Austin's Jurisprudence* (Springer 2012) 51-71 and Lars Vinx, 'The Kelsen-Hart Debate: Hart's Critique of Kelsen's Legal Monism Reconsidered' in D.A. Jeremy Telman (ed), *Hans Kelsen in America: Selective Affinities and the Mysteries of Academic Influence* (Springer 2016) 59-83.

<sup>3</sup> For Kelsen's version of international legal monism see Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts-Beitrag zu einer reinen Rechtslehre* (JC Mohr 1920); Hans Kelsen, *Reine Rechtslehre: Einleitung in die rechtswissenschaftliche Problematik* (Deuticke 1934). For a magisterial treatment of Kelsen's position on international law see Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (CUP 2010). For a classic discussion of legal monism in international law see For discussion see J. G. Starke, 'Monism and Dualism in the Theory of International Law' (1936) 17 BYIL 74; for contemporary treatments see James Crawford, *Chance, Order, Change: The Course of International Law, General Course on Public International Law* (Brill 2014) 212-43; Beatrice I. Bonafé, 'International law in domestic and supranational settings' in Jörg Kammerhofer and others (eds), *International Legal Positivism in a Post-Modern World* (CUP 2014) 378.

<sup>4</sup> Vinx, 'The Kelsen-Hart Debate' (n 2) 69.

So it must look as though legal monism is a non-starter. But let us indeed take Vinx's example as the acid test for legal monism and make trial with it: let us imagine an Imperial Chinese norm (C) and an Imperial Roman norm (R). In order to make the trial harder, let us further assume, *contra veritatem*, that there were no economic or social relations between the Roman and the Chinese People, and let us go so far as to assume that the Romans did not know about the Chinese and the Chinese did not know about the Romans and that there was accordingly not even rudimentary international law regulating the legal relation between the Romans and Chinese. Let us assume that they could have as well inhabited different planets in different galaxies.

To be sure, if one took the point of view of Roman Imperial law, then, given our assumptions, there would be no Chinese law. Alternatively, if one took the point of view of Chinese Imperial law, there would be no Roman law. However, rather than establishing pluralism, in both cases one would end up with one legal system only and legal pluralism would thus not even be on the table as an option. So in trying to defend pluralism one has to take a position that allows R and C to be valid *simultaneously*. As it will turn out, a point of view that allows us to take R and C to be both valid legally is a point of view which already presupposes legal monism. So pluralism arises as an option only when one has already assumed monism.

This will of course not suffice to convince the pluralist. After all, in our example it appears plain and certain that R and C, whilst both legally valid, stand in no legal relation to each other. Both legal systems are strictly separated geographically and whilst R applies in the Roman Empire (and not in the Chinese Empire), C applies in the Chinese Empire (and not in the Roman Empire). So given the strict separation of spheres of applicability, where should we find the legal relation which the monist claims is unavoidable if we want to assume two simultaneously valid legal norms?

Let us have a closer look at this separation of applicability. What does it mean to claim that the spheres of applicability are separated? It means, of course, that legally the applicability of certain norms is limited to certain regions. A *legal* limitation of the applicability of norms, however, can be effected only by a legal norm which is superior to the norms the applicability of which is limited, i.e. a universal norm. Let us call such a norm 'U'. Now, this norm, which is superior to the norms the applicability of which is limited, links the two geographically separated legal systems and unifies them into one legal system. So it is precisely this division of spheres of applicability which gives us the legal relation that monism claims is necessarily present.

There are at least three replies to challenge the claim that this 'conferral of spheres of applicability' by norm U constitutes a legal relation uniting the two legal systems: first, one can argue that the relation of divided applicability is *not a legal relation* but simply the fact of geographic separation; second, one can argue that even if one accepted that the conferral of spheres of validity were a legal fact, this fact does *not establish the unity* of the two systems; third, one could argue that even if one accepted that a unity between the legal systems were established, this would be a unity in name only and would be *theoretically uninteresting*.

Let us have a look at the first argument first. Granted, the spatial separation of the two empires is certainly first and foremost a geographic fact. However, a fact alone does not establish its own legal significance. After all, the Roman provinces of *Germania Inferior* and *Arabia Petraea* are also spatially (and culturally) separated. Still, this separation does not have the legal significance which the separation between the two empires is claimed to have. So there must be some criterion that distinguishes between the two cases and determines that whilst in one case Roman Law applies to both spatially separated regions, in the other case Roman Law does not apply to both regions but

only to one. Now, since any criterion that determines the conditions of the applicability of law is a *legal* criterion, the separation of the two systems is fundamentally a legal separation.

It thus turns out that whilst at first it is legal monism that might seem counter-intuitive, it ultimately is legal pluralism which is paradoxical and rests on a misunderstanding: it fails to see that normative separation has to be a normative relation. Legal pluralism starts from the logically incoherent idea of two legal systems that are both normatively separated yet unrelated. For that to be possible, the highest norm of the one legal system must not apply to the other legal system. However, the fact that a norm does *not* apply somewhere is not a brute fact but itself a legal fact. Thus, there has to be an even higher norm which stipulates that the seemingly highest norm applying to the one legal system does not apply to the other legal system. This higher norm, by definition applies to both legal systems and establishes legal monism. So as soon as we think we have established pluralism (our highest norm does not apply there), what we have actually established is monism (there is a higher norm applying to both systems).

Let us now turn to the second argument. This argument accepts the refutation of the first and thus accepts that the conferral of spheres of applicability of the law is not simply a brute fact but a legal fact. What it resists is the further conclusion that this legal fact by itself implies a legal relation between the two legal systems. After all, the limited spatial applicability of Roman Law to the Roman Empire could be the legal result of a Roman Imperial rule  $R^{\star}$  and the limited spatial applicability of Chinese Law to the Chinese Empire could be the legal result of a Chinese Imperial rule  $C^{\star}$ . The limitation of applicability could thus be seen to be effected entirely *from within* each legal system.



Furthermore, the argument would run,  $R^*$  and  $C^*$  do not have to stand in any legal relation to each other whatsoever.

Or do they? Let us see if this argument can really deliver a pluralist solution.

The argument only works if it is actually *by dint of*  $R^*$  and  $R^*$  alone that the applicability of Roman law is limited to the Roman Empire. After all, if it were some other hidden or implicit norm that effected the separation of applicability, we would be thrown back to the above solution where a universal norm  $U$  was responsible for the separation and thus the normative unification of legal systems. So, it has to be the case that without  $R^*$  the applicability of Roman law would not be limited to the Roman Empire. If that is the case, however, then Roman law is in principle applicable universally, i.e. also including the Chinese Empire. The same is true for Chinese Imperial law. But if, from the point of view of Roman law, Roman law is applicable universally (and thus also to the Chinese Empire), then Chinese law is valid in the Chinese Empire only because Roman law via  $R^*$  allows it to be valid. So, at least from the point of view of Roman Law,  $C$  is valid only because it is allowed to be valid, it is valid only because of  $R^*$ .

So if we took the limitation of applicability of Roman law to the Roman Empire to be an effect not of a superior universal norm  $U$ , but of a Roman norm  $R^*$ , then the result would not be a pluralistic one but rather that any law whatsoever would be delegated by this norm  $R^*$ , thus unifying all law into one system. A norm cannot meaningfully limit a competence it does not possess and in order to allot competences it has to possess the competence to allot competences. So if  $R^*$  is to limit the applicability of  $R$  to the Roman Empire,  $R^*$  must have the competence over any law whatsoever and  $C$  can apply to the Chinese Empire only because  $R^*$  allows it to apply there. The same is, of course, true from the point of view of Chinese Imperial law.

However, whatever point of view one takes, one always ends up with a monistic construction and never with a pluralistic one. One can never take both points of view at the same time.

The final riposte bites the bullet and accepts that monism is necessary true. What it claims, however, is that the victory of monism is a Pyrrhic victory: monism has been saved at the cost of making it trivial, uninteresting, or even tautologically true.

This, however, is thinking too quickly. It assumes that everything which is necessarily true is also trivially true. But this is certainly not the case. It is necessarily true that the three angles in a triangle add up to 180 degrees. Whilst necessarily being true, it is certainly not trivially true and it is worth telling people, and, if people deny it, it is worth demonstrating. There are, of course, many truths of this kind.<sup>5</sup> Whether a necessary truth is interesting or not depends not only on its own necessity but also on what beliefs tend to be held as plausible.

So what does the necessary 'legal relation' between all norms actually signify? Let us start by making clear what it certainly does not mean: it does not mean that all law forms one legal system in a sociological or otherwise cultural sense. It would be absurd to deny that there are different legal cultures and certainly French law is not British law. The argument about monism is not about legal culture. Legal culture and the unity of a legal system run perpendicular. Just as monism does not necessitate a unitary legal culture, so different legal cultures do not necessitate different legal systems, as can plainly be seen in the case of federal states: the different US states all have different legal histories and cultures, yet they are all undeniably part of one legal system.

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<sup>5</sup> Many examples for necessary yet interesting truths can be found in Roy Sorensen, *Thought Experiments* (OUP 1998).

The early Kelsen believed that the necessary unity of the law amounts to the demand of material consistency of all law, i.e. ultimately the demand that R and C do not conflict. He tied up his version of legal monism so tightly with this demand for material consistency that when he later gave up the demand for material consistency he also felt compelled to jettison monism.<sup>6</sup> But I think that Kelsen was rushing through things here. Whilst the later Kelsen might very well be right that demanding material consistency puts too much of a burden on the positive law, legal monism is independent from the claim for material consistency and thus survives even if we let go of the latter.

So if it is neither a degree of cultural homogeneity nor material consistency, what does 'legal relation' signify? If it is not the case that they must not contradict each other, in what sense are R and C 'necessarily related' if they are to be both considered legally valid? They are related in the sense that there has to be some kind of legal procedure to determine how to apply both rules and how to deal with potential legal conflict. This procedure can be 'apply the younger rule', or 'apply the rule which is geographically applicable', or 'apply the higher rule and disregard the lower rule', or 'apply the rule you think is better'. There thus has to be a procedure which gives both *consideration*. Consideration here means that both norms are worth discursive reflection and that no legal rule can be excluded from the outset without giving *legal* reasons for this exclusion. Of course in many cases, as in our example of the two empires, these legal reasons are so obvious that they do not need much elaboration. Whilst it is certainly an obvious fact that Roman Law is not to be applied in the Chinese empire and vice versa it is no less a legal fact.

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<sup>6</sup> See Hans Kelsen, *General Theory of Norms* (Clarendon Press 1991) 214.

One corollary of this is further specified by Vinx: monism is the claim that all legal conflicts are amenable to legal resolutions, whereas pluralism must certainly claim that inter-systemic conflicts have no legal resolution but are—in a Schmittian sense—irreducibly political.<sup>7</sup>

## *2. Normative Monism*

The step from legal monism to normative monism is a small one. One only needs to follow through the above line of argument and drop the qualification of ‘legal’. The argument I present will thus not rely on meta-ethical reflections on the nature and status of ought-statements. Rather it will trace the same formal route we went down in order to argue for legal monism:<sup>8</sup> any establishment of two or more separated normative realms implicitly relies on a norm of separation, which in turn has to be of a normative nature. Such a norm of separation unifies the realms it is supposed to separate.

Before laying out this argument in more detail let me make a couple of clarifications: normative monism must be kept conceptually separate from value monism, with which it is not conceptually tied up or committed to. Normative monism is thus not opposed to value pluralism.<sup>9</sup> Rather conversely, normative monism might very well be a constitutive element of a sound value-pluralist theory. The reason for this comes to light as soon as one acknowledges that any theory of a pluralism of values has to account for the fact that plural, incommensurable or incomparable values

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<sup>7</sup> Vinx, ‘The Kelsen–Hart Debate’ (n 2) 81.

<sup>8</sup> By going down this route I follow Kelsen’s instructive lead to model solutions to meta-ethical questions on legal structures and not vice versa.

<sup>9</sup> For a good starting point into the discussion see Chris Heathwood, ‘Monism and Pluralism about Value’ in Iwao Hirose and others (eds), *The Oxford Handbook of Value Theory* (OUP 2015) 136.

still have to be intelligible *as values*. The normative monist can tell a story of how a single normative space, whilst not committing us to any substantive notions of axiological consistency or comparability, nevertheless pre-structures the argumentative landscape. As we will see later on, normative monism, just as legal monism, is a thin formal claim, and whilst it is certainly theoretically interesting and practically relevant it does not commit one to either material consistency or universal comparability of values. Equally, normative monism does not deny that there might be different or distinguishable sources of normativity. All it claims is that all these sources lead into one sea of normativity.

Given all these caveats, I do not think that normative monism is a particularly controversial position to hold. It is simply the insight that we as agents and addressees of normative demands are in an important sense unitary, that reason is in an important sense unitary, and that, in this respect, the topological nature of normativity has to reflect this quality of ours. Normative monism is but the elaboration of what Thomas Nagel calls the ‘singleness of decision’.<sup>10</sup> This insight is, I think, also what drives natural law theory to deny that there can be a legal ought which is strictly separable from the moral ought yet is at the same time normatively sound and not reducible to prudential

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<sup>10</sup> Thomas Nagel, ‘The Fragmentation of Value’ in *Mortal Questions*, (CUP 1979) 128–41. Nagel is right to argue that from the singleness of decision we cannot deduce the necessity of a unified theory of how to decide. But what we undoubtedly do get from this irreducibly singleness is the weaker claim that there is only one normativity.

considerations.<sup>11</sup> It inspires many forms of contemporary hard positivism,<sup>12</sup> and can, I think, be considered a mainstream view in meta-ethics.<sup>13</sup>

Despite all of this, to common sense normative monism seems plainly wrong: after all, morality, law, etiquette, and say, the rules of chess, seem to quite straightforwardly inhabit distinct and separate islands of normativity. They do not seem to form one normative system.

However, just as in the case of legal normativity, we can only consider all of these systems to be normatively valid simultaneously, if we at the same time presuppose the validity of an application regime, either by distributing different realms of application to each normative realm or by resolving overlapping realms of application by a priority rule.

Let us have a look at the relation between morality and, say, chess. A normative pluralist would claim that at its core the rules of chess and the rules of morality are different and separable sets of rules. Both apply to different spheres of human life and are thus separate normative realms. However, as we have seen in the discussion of legal monism, such a normative separation of spheres of application quite straightforwardly

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<sup>11</sup> Finnis, for instance, calls the ‘moralist’, the ‘reasonable person with unrestricted perspective’. John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 361.

<sup>12</sup> Normative monism would have helped Raz solve a puzzle he thought he had identified in Kelsen’s work, namely that whilst ‘Kelsen rejects natural law theories, he consistently uses the natural law concept of normativity, i.e. the concept of justified normativity’. This should come as no big surprise. As we have seen, Kelsen (at least in some passages of his oeuvre) shares with natural law theory the insight that there can only be one normative system, only one kind of ought. However he rejects natural law theory’s belief that law and morality can be part of this one normative system. Joseph Raz, ‘Kelsen’s Theory of the Basic Norm’ in Stanley L. Paulson and others (eds), *Normativity and Norms. Critical Perspectives on Kelsenian Themes* (OUP 1998) 47, 67. On Raz’s view of Kelsen’s normativity see Stanley L. Paulson, ‘A “Justified Normativity” Thesis in Hans Kelsen’s Pure Theory of Law?: Rejoinders to Robert Alexy and Joseph Raz’ in Matthias Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (OUP 2012) 61–114.

<sup>13</sup> See only Judith Jarvis Thomson, ‘Normativity’ in Russ Shafer-Landau (ed), *Oxford Studies in Metaethics. Volume 2* (OUP 2007) 240 who rejects the view that there are multiply senses of ought, each related to a different normative domain, and who thus rejects the idea that there was a different legal ought, to be distinguished from a moral ought, to be distinguished from an ought of courtesy or chess.

establishes monism rather than pluralism: if there are to be different spheres of applicability, different competences for the different normative realms, there has to be some kind of allocation of applicability, some kind of rule X that determines the field of competence of each realm. This rule, in turn, unifies the two normative systems.

Now, morality is widely held to be both *comprehensive* and *dominant*, i.e. it is held to be in principle relevant to all decisions and, where relevant, to defeats all other considerations.<sup>14</sup> Thus, for most moral philosophers this allocation-rule X is part of morality.

So, usually, the chess/morality system is seen in the following way: morality applies to all circumstances and defeats all other considerations. However, some actions are morally neutral, like the act of pushing pieces across a board. Such acts can be governed by other sets of rules, e.g. by the rules of chess. This division of spheres of competences is an effect of morality itself. Because of comprehensiveness and dominance, it is morality that allocates all other competences and this competence-competence resides within morality. All other normative fields get their normative competence delegated by morality. The rules of chess apply as long as they do not violate morality and you *may* promote your pawn to queen by advancing it to the last row if this does not, by some awful coincidence or devilish interference of a demon, mean that someone innocent gets killed. But as long as you do not violate morality, the chess rules can legislate whatever they want. Under this construction it is plain that one ends up with only one normative system, which could be called the empire of morality, or, if one wants, the kingdom of ends. All other seemingly separate normative realms are dependent territories of this kingdom.

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<sup>14</sup> Apart from 'political realists' who reject the comprehensiveness and 'dirty hand theorists' who reject the dominance of morality I think it is safe to say that most moral philosophers implicitly are committed to comprehensiveness and dominance. See CAJ. Coady, 'The Moral Reality in Realism' in (2005) 22 *Journal of Applied Philosophy* 121.

So there is, of course, a sense in which chess and morality are two different normative systems. A normative monist would not deny that. Just as a legal monist would not deny that there is a sense in which French and German law are different legal systems. What a normative monist denies is that it could ever be the case that there were no normative relation between chess and morality. This is inconceivable, since the more clearly the spheres of applicability of the two systems are separated, the more clearly the two systems are related via the requisite norm of separation.

To be sure, however, monism does not depend on the comprehensiveness and dominance of morality. If we truly held that there were some areas to which morality *did not apply* or in matters of which, even if it did apply, it did not have the last word, then there would still have to be an allocation rule X, which, whilst not part of morality, still determined where which norms apply.

Monism is thus a necessary result. But is it an interesting result? As we have seen, normative monism does not lead to or favour value monism. Nor does it favour moral comprehensiveness or dominance over more politically realistic constructions. Equally, it does not commit one to normative uniformity or homogeneity of content. So what does it commit one to?

Well, normative monism tells us a couple of crucial bits about the nature of the normative space as such. It tells us, for instance, that no valid norm can be *excluded* as irrelevant a priori. Thus all valid norms are in principle normatively *reachable* from any point in the normative space and all normative considerations are in principle relevant to each other. Special reasons need to be given to exclude a valid norm as irrelevant and these special reasons have to have the form of norms. The normative space is thus a *continuous* space which does not allow for inaccessible areas. These are *topological* qualities and we can call them *non-exclusion*, *reachability* and *continuity*.



These might seem to be entirely abstract qualities. However, as it will turn out, they are highly relevant to the relation of law and morality.

### *3. The Great Incompatibility*

Where do we stand? I have argued that by necessity there can only ever be one continuous normative system. Thus, in order to be valid simultaneously, law and morality would have to be part of one single normative system. In this conditional claim lies the truth and one of the main insights of natural law theory: *if* law and morality are to be simultaneously valid they have to be part of one normative system.

The only trouble is that law and morality cannot be part of one normative system. Thus they cannot be valid simultaneously.

Why should this be the case? Have we not seen above that morality and, say, chess can without much trouble be understood as being part of one normative system? Why should this be different for the law?

What distinguishes law from chess is that whilst chess, just as morality, is a static normative system,<sup>15</sup> the law is a dynamic normative system. This means that the law has a different mode of individuating or applying its content: whilst the content of rules of morality and chess are individuated or applied by way of thought or reflection, the law's content is individuated and applied by way of decisions, or acts of will. This difference of content individuation taken together with the topological quality of the continuity of the normative space produce the normative jinx.

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<sup>15</sup> Chess is a static normative system in the sense that whilst rules of chess can of course change, changing the rules is not part of playing the game of chess. A change of rules of chess creates different games of chess, like, for instance, speed chess or killer chess. Furthermore, the rules of chess are individuated and applied to individual games of chess straightforwardly by reference to their content.

Of course, we must not overplay the difference between static and dynamic, just as we must not overplay the difference between thinking and willing. Each act of thought is certainly also an act of will and no act of will can be entirely devoid of thought. Still, whatever the actual and spurious differences between thinking and willing—and they have been discussed in the literature *ad nauseam*—I want to rely on a simple example to illustrate one decisive and irreducible difference between the static and dynamic mode of content-individuation: in the law it is possible, and also quite common, that a legally faulty and thus *wrong* decision, which is known to be faulty and wrong, nonetheless becomes part of the law. This could be the case, for instance, when a faulty court judgement or an unconstitutional statute is, for whatever reasons, not challenged legally.<sup>16</sup> In those cases, which are of course legion, the wrong decision becomes part of law. So it is quite common that in the law even unlawful law can become law. This is an effect of what in German is called *Rechtskraft*. The idea is conveyed in the English language by the concepts of legal force, preclusion, collateral estoppel and *res judicata*.<sup>17</sup>

Now, such an effect would be inconceivable in the realm of morality. In morality, that what is known to be in violation of morality cannot be part of morality. No moral rule could ever remain part of the stock of moral rules if everyone knew that it was a

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<sup>16</sup> For a discussion of this topic, which is generally neglected in the Anglo-American literature, see one important contributor to the Pure Theory of Law Adolf Merkl, *Die Lehre von der Rechtskraft: Entwickelt aus dem Rechtsbegriff. Eine rechtstheoretische Untersuchung* (Deuticke 1923). See also Christoph Kletzer, 'Kelsen's Development of the Fehlerkalkül Theory' in (2005) 18 *Ratio Juris* 46.

<sup>17</sup> It is also a frequent feature of quick, competitive games that decisions of umpires which later turn out to be factually wrong (i.e. a goal was given even though the ball did not fully cross the line) remain unchallengeable and thus become part of the official score. Whilst there is, of course, a certain analogy to the doctrine of *res judicata*, the analogy only goes that far. The decisive difference of such unchallengeable umpire decisions to the dynamic system of the law is that unchallengeable umpire decisions only relate to factual errors and not to erroneous understanding of the rules of football themselves or to the creation of such rules.

morally wrong rule. This would be inconceivable, since it is the whole point of morality to exclude precisely this kind of content.<sup>18</sup>

This, however, is not the case with the law. It is certainly not the whole point of the law to prevent a certain content.

This fundamental and irreducible difference results from the privileged rôle the decision plays in the positive law. Whatever its supposed content, the law by necessity *authorises* the creation of law in violation of this content.<sup>19</sup>

But what can this mean for the relation of law and morality? It means that the standard way the relation of law and morality is modelled is flawed. With some minor differences both contemporary legal positivists and natural law theorists agree that it is best to model the morality/law relation along the lines of the morality/chess relation: morality sets the boundaries of what we ought and ought not to do, what we have reason to do and what we have reason not to do. Within those boundaries we might find it hard to know exactly which reasons apply to us and/or we might not be able to unilaterally solve certain co-ordination problems. This is where the law is seen to step in. Roughly speaking it is taken to add *determinationes* (concretisations, implementations)<sup>20</sup> to the rough grid of morality.

Now, despite its appeal, this model is, unfortunately, untenable when it comes to the relation of morality and law. This is so because in aiming to delegate to the law,

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<sup>18</sup> Of course, some argue that in morality there is a 'right to do wrong'. But this is a different matter altogether. It does not arise from the individuation of a general moral norm in violation of this general norm, but is an alleged feature of moral rights. See Jeremy Waldron, 'A Right to Do Wrong' in (1981) 92 *Ethics* 21; William A. Galston 'On the Alleged Right to Do Wrong: A Response to Waldron' in (1983) 93 *Ethics* 320; Ori Herstein, 'Defending the Right To Do Wrong' in (2012) *Cornell Law Faculty Publications. Paper* 339.

<sup>19</sup> It would be a mistake to conclude that this authorisation to *also* create law *ultra vires* is the same as the renunciation of the notion of delegation as such. After all, the fact that there might be two routes to the validity of a norm does not mean that there is no difference between these two routes.

<sup>20</sup> Finnis (n 11) 284; *Summa Theologica*, 1a2ae. 91,3

morality is caught up in a quandary: it aims to hand out a materially limited competence but it also wants to hand it out to a system which does not fully respect material constraint, a system into which this material constraint does not directly translate. So in this delegation to the law morality is either not in earnest with material constraint or it is not in earnest with the delegation itself. As soon as morality allows for law it by necessity allows for the possibility of creation of law in violation of morality. This is the simple consequence of the doctrine of legal force. Allowing for law and allowing for the violation of morality thus mean one and the same thing.

This means that as soon as morality delegates to the law, it delegates to a system where the wrong can become the right. So as soon as morality delegates to the law it cannot contain this delegation. This is why Kelsen writes that ‘...the delegation of positive by natural law must mean that natural law empowers positive law to replace it.’<sup>21</sup>

There are two classic strategies to try to avoid this conclusion. One is to deny outright the necessarily dynamic character of the law. The other is to accept the dynamic character of the law but to claim that morality can retain mastery of the terms of the delegation and thus contain the dynamism of the law.

The first is the strategy at least in part followed by Dworkin’s interpretivism. It argues that the law is dynamic only in a pre-interpretative sense. However, in a full post-interpretative sense, the law is ultimately not dependent on will or decision but only on sound moral reason. Thus, whilst unlawful and immoral law might be part of the law in a pre-interpretative sense, it is not part of the law in the full sense of the

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<sup>21</sup> Hans Kelsen, *The General Theory of Law and State* (n 1) 413.

term. This solution is certainly not without merits. However, as has been commented,<sup>22</sup> it comes at a very high theoretical price: it requires us to introduce a theoretically difficult dichotomy at the heart of our concept of law, and it requires us to give up the doctrine of *res judicata* in relation to law in the full sense of the term.

The second strategy is the classic natural law strategy. It argues that morality remains firmly in the driving seat as concerns the delegation of individuation to the positive law. Finnis, for instance, claims against Kelsen that ‘to delegate is not to delegate unconditionally.’<sup>23</sup>

True. The question, however, is whether conditional delegation of powers to the law is at all possible in the way Finnis envisages.

The material conditioning of the delegation of powers according to Finnis rests on a complex rider and is further complicated by the collateral duties one has to obey laws which taken by themselves have actually overstepped this material limitation. However complicated and meandering, Finnis thinks that there is a line that can be drawn between what the law can do and what it cannot do.<sup>24</sup>

But the problem lies not so much in the specific design of the line drawn but in its very nature. The difficulty resides not so much in conditions of delegation but in the very nature of ‘conditional delegation’.

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<sup>22</sup> See only Andrei Marmor, *Interpretation and Legal Theory* (Hart, 2005) 27–47; Joseph Raz, ‘Authority, Law, and Morality’ in Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (OUP 1995) 210, 220–6.

<sup>23</sup> Finnis (n 13) 27. Finnis accepts Kelsen’s portrayal of natural law theory and his formulation of ‘delegation’ as not classical, but still accurate.

<sup>24</sup> Whilst Finnis keeps stressing that for him and for classic natural law theory the question of iniquitous law is not a central question, it is certainly a central question to many and can also work as one of the few litmus tests as to where people stand in questions of legal philosophy. For Finnis, ultimately, there is a clear line to be drawn, where *lex iniusta non est lex*.

How is conditional delegation supposed to work? There are two ways of modelling conditional delegation which are usually run together: on the one hand (i) there is the idea that the conditions of delegation do not translate into legal conditions and remain purely moral conditions; on the other hand (ii) there is the idea that the conditions of delegation translate into the law and thereby become legal conditions.

Now, the problem is that neither of the two options seems to get conditional delegation right: (i) in the first case it is hard to see how emphatically non-legal conditions can condition the validity of law. Of course, any non-legal fact can become a condition for the validity of law, the raising of hands, the uttering of words, and so on—but this can only work if the law declares these facts to be conditions. The non-legality of the moral conditions is here taken not as a provisional quality, but according to this view it is the moral quality of these rules itself that limits the competence of the law and not a reference to this moral quality by the law.

There is a certain magic at work in this view and few natural law theorists would actually argue that morality does *by itself* condition the validity of the law.<sup>25</sup> What most would rather argue is that whilst not directly conditioning the validity of the law, morality conditions the ‘obligatoriness’ of the law. This divorce of validity and bindingness of rules, as appealing a route as it might seem to get us out of this predicament, however comes at a very high cost: it divests validity of its normative nature and relegates to it the role of a mere indicator of membership. On the other

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<sup>25</sup> Robert Alexy is one of the few authors that would argue that morality conditions the validity of law. For a set of recent arguments against Finnis’s account of natural law along those lines see Robert Alexy, ‘Some Reflections on the Ideal Dimension of Law and on the Legal Philosophy of John Finnis’ in (2013) 58 (2) *American Journal of Jurisprudence* 97. For Finnis’s reply see John Finnis, ‘Law as Fact and as Reason for Action: A Response to Robert Alexy on Law’s “Ideal Dimension”’ in (2014) 59 (1) *American Journal of Jurisprudence* 85.

hand, it overextends the notion of ‘obligation,’ which, being uprooted from its actual instantiation in valid norms, and turned into a crypto-metaphysical, magical quality.<sup>26</sup>

Under this view valid rules can be but do not have to be obligatory. Equally, it seems, non-valid rules must be able to be obligatory, as is the case with *ius cogens*. At one point Finnis claims that validity is at least a necessary condition of obligation.<sup>27</sup> This, however, sits uncomfortably with his theory of *ius cogens*, the whole point of which is, of course, to be binding by virtue of its content and not of an enactment.<sup>28</sup>

Thus, ultimately, validity decides nothing. Equally irrelevant is the question as to whether there might be a secondary or collateral moral duty to obey (somewhat) immoral but valid laws.<sup>29</sup> The idea here is that validity is not irrelevant, as we have morally good reason to follow even (somewhat) morally defective laws, if they are valid, since having a legal regime is itself an objective good and not following these valid if (slightly) defective laws would undermine this legal system.

But is it really validity that makes the difference here? Well, it is not. What makes all the difference is a quality which usually goes hand in hand with validity and is therefore easily confused with it: the effectiveness of rules. It is, after all, not the validity of rules that gives us good moral reasons to comply with (slightly) immoral laws but its actual effective operation.

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<sup>26</sup> Finnis does not solve problem of obligation at end of chapter 11 and accepts this conclusion. He postpones the analysis to theological reflections. This should not surprise us and at least Finnis, just as Kant, is up-front about the fact that one cannot have this kind of isolated obligation without metaphysics and theology. Finnis (n 11) 343.

<sup>27</sup> Finnis (n 11) 334.

<sup>28</sup> Finnis (n 24) 94-5.

<sup>29</sup> Finnis (n 11) 351-2 and 362. Finnis calls these obligations ‘diminished’ and ‘extra-legal’.

To see that legal validity is irrelevant in arguments about collateral duties one only needs to ask whether an effective rule which is for some reason formally invalid would fail to create collateral duties of this kind. Of course it would not. But does not validity at least solve co-ordination problems? Do we not need valid rules to know which side on the road to drive on? Not really. It is, again, the effectiveness of rules and not their validity that solves the co-ordination problem.

All validity might be granted to do under this theory is to lend a defeasible presumption of obligatoriness, a *prima-facie* obligatoriness. This, however, does not really matter here. After all, the only standpoint that matters is the all-things-considered standpoint, especially in cases where a full consideration is possible and also itself obligatory, like it is the case in moral matters. Again, it is morality that decides.

So if validity decides nothing and morality everything, what is the point of validity? And if there is no point left to validity, in what sense should we speak of delegation at all? So by first maintaining that morality by itself determines the validity of the law and then divorcing the validity from bindingness we have saved conditionality only by sacrificing delegation as such.

The second (ii) model of conditional delegation does not fare much better. If we take morality's conditions to translate into *legal* conditions of validity, then the problem is that the law as a dynamic system cannot be trusted with the faithful enforcement of these conditions. There is no doubt that law can be law even if it is in violation of the law. Thus there can be no doubt that law can be law even if it is in violation of the conditions that morality has imprinted into the law. So whilst morality has to understand these conditions to be absolute, the law cannot understand them to be



absolute. Thus there is a sense in which morality cannot imprint *its* conditions into the law. So whilst delegation is possible, it is not really conditioned.<sup>30</sup>

#### 4. *The Normative Jinx*

Put in a nutshell, the argument I presented and defended is the following: the way that natural law theory conceptualises the relation of law and morality is the only possible way to conceptualise the relation of law and morality—but, unfortunately, natural law is in itself impossible. Put differently: natural law is correct in arguing that if law and morality claim to be both valid, they *needed to be* part of one normative system; however natural law is wrong in assuming that law and morality *can* ever be part of one normative system.

This means the following: as soon as we take the point of view of law there is no morality to assess the law and as soon as we take the point of view of morality there is no law to be assessed. You can take one point of view and I can take the other. I can

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<sup>30</sup> Whilst the present argument certainly gains its substance from Kelsen's reflections on the so-called *Fehlerkalkül* ('error-calculus') and alternative authorisation it does not rely on a fully fledged defence of Kelsen's views. All it needs to get off the ground is the acceptance that there is such a thing as legal force and that it is thus at least possible that unlawful law becomes law. Still, it could be argued, that irrespective of voidable norms there must still remain norms which are so far removed from their legal conditions that they are absolutely null and void. However, when one reflects on the notion of absolute nullity, one sees that here, too, someone would have to apply the criteria of absolute nullity in order to decide whether the norm in question falls under them. In the case of absolute nullity it could be argued that no specific organ but everyone is called upon to make this decision for oneself. In that case, however, the question arises whether this decision of each and everyone is of a declaratory or constitutive kind. Since understanding these decisions as merely declaratory does not make sense, they have to be understood to be constitutive. This, however, in turn, means that until this decision is actually taken, the norm has to be seen to be valid and if the decision is not taken remains valid. Thus there is really no place for absolute nullity. For an elaboration of this argument see Christoph Kletzer, 'Kelsen's Development of the Fehlerkalkül Theory' (n 16). For a discussion of Kelsen's on alternative authorisation views see Stanley Paulson, 'Material and Formal Authorisation in Kelsen's Pure Theory' (1980) 39 *Cambridge Law Journal* 172, JW Harris, 'Kelsen's Concept of Authority', (1977) 36 *Cambridge Law Journal* 353, David Dyzenhaus, *Legality and Legitimacy. Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar* (Oxford University Press 1997) 155, and Carlos Santiago Nino, 'Some Confusions Surrounding Kelsen's Concept of Validity', in Stanley L. Paulson and Bonnie Litschewski-Paulson (eds) *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Oxford University Press 1998) 253.

take one now and the other tomorrow or I can switch back and forth between them in moments. What I cannot do is take both at the same time.

However much we would like to have an object of assessment when we talk morally about the law, we simply do not have one. As soon as we try to assess the law morally what we are assessing cannot possibly be the law. What we are assessing are thus social arrangements, constellations of influence, modes of force and coercion and the like. It is certainly morally wrong to incentivise people to kill each other, to coerce them to keep racially segregated and so on. However, as soon as one employs this moral filter, there is no valid law to assess. What is left are only acts of force and coercion. If, on the other hand, one takes the legal perspective and argues that one ought to pay taxes, one is allowed to kill someone in self-defence etc, then there is no morality left from which to assess these claims.

The normative jinx might be a surprising result, but it follows neatly from what are, I think, rather uncontroversial claims.